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Supreme Court, U.S.
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No. 00-1102

IN THE

SUPREME COURT OF THE UNITED STATES

TAHIR M. BAWAZIR,

Petitioner,

v.

SHEIKH KHALID BIN MAHFOUZ,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE WASHINGTON STATE COURT OF APPEALS
(DIVISION I)

REPLY BRIEF FOR PETITIONER

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PRELIMINARY STATEMENT

Respondent Sheikh Khalid Bin Mahfouz ("Sheikh Mahfouz") virtually ignores the merits of the underlying Petition in his Brief in Opposition. Rather, he asks the Court to deny the writ on procedural grounds, claiming the Court "lacks jurisdiction to review the decision of the Washington State Court of Appeals" under 28 U.S.C. §1257 because Petitioner Tahir M. Bawazir ("Bawazir") purportedly failed to (1) "properly raise a substantial federal question below," (2) "comply with Supreme Court Rule 14," and (3) show a "conflict exists among the lower courts with regard to the issues presented herein" under Supreme Court Rule 10(b). Respondent's Brief in Opposition ("Opp.") at 6. Sheikh Mahfouz's arguments are without merit.

First, Sheikh Mahfouz ignores that, in the proceedings below, *both parties* addressed whether Washington State could assert personal jurisdiction over him consistent with the principles embodied under the Due Process Clause of the Fourteenth Amendment. Those arguments, and the decisions by the Washington State courts, form the basis for the federal constitutional issues framed in Bawazir's Petition. Second, Sheikh Mahfouz misapplies the Supreme Court Rules as an alternative basis to deny jurisdiction. Sheikh Mahfouz's highly strained interpretation of the Supreme Court Rules is not a proper ground for this Court to decline jurisdiction.

Bawazir's Petition raises important questions under the Due Process Clause about when states may assert personal jurisdiction over foreign persons, like Sheikh Mahfouz, who derive substantial economic benefit by conducting international commerce in a forum state personally and through their agents. The decision of the Washington State courts below conflicts with the precedent of this

Court, and other state and federal courts, as to when personal jurisdiction may be asserted consistent with the due process principles established by this Court. Sheikh Mahfouz has not rebutted in his Opposition the compelling reasons why certiorari should be granted. Left undisturbed, the decision of the Washington State courts will cause a chilling effect on international commerce.

A. This Court Has Jurisdiction to Review the Petition Because the Federal Issues that Are Raised Were Addressed Below.

Sheikh Mahfouz claims that this Court lacks jurisdiction to hear the Petition because "[o]f the four issues Bawazir presents for review by this Court, only the third was raised below." Opp. at 6. Sheikh Mahfouz ignores the fact that all four issues raised in the Petition were specifically addressed to the Washington State trial court and Washington State Court of Appeals, and were preserved in Bawazir's Petition for Discretionary Review to the Washington State Supreme Court. Relevant excerpts of Bawazir's briefs, which expressly address the federal issues raised in the Petition, are attached as an Appendix to this Reply.[1]

Sheikh Mahfouz's claim that these issues were not raised below is disingenuous given that *he* sought dis-

[1] In determining whether a question was "specially set up or claimed" within the meaning of §1257, "it is relevant and usually sufficient to ask whether petitioners satisfied the state rules governing presentation of issues." *Amalgamated Food Employees Union Local 509 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 334 (1968) (Harlan, J., dissenting). Sheikh Mahfouz makes no claim that Bawazir did not comply with the state rules in presenting the federal issues on appeal, and they are explicitly referenced in Bawazir's Appellate Brief as required under Washington Rules of Appellate Procedure Rule 10.3. *See App.* A-12 - A-21.

missal of the lawsuit against him because, he argued, the exercise of personal jurisdiction over him would violate the Due Process Clause. *Cf. Cohen v. Cowles Media Co.*, 501 U.S. 663, 668 (1991) ("It can hardly be said that there is no First Amendment issue present in the case when respondents have defended this suit all along... [under] the First Amendment").

In addition, all four issues raised in the Petition center on whether Sheikh Mahfouz's contacts with Washington State satisfy the purposeful availment requirement under the Due Process Clause. Sheikh Mahfouz *concedes* the third issue relating to the purposeful availment requirement under the Due Process Clause "was raised below." Opp. at 8. This is all that is necessary for jurisdiction to exist for all of the issues raised in the Petition. *See* Robert L. Stern, et al., *Supreme Court Practice* §3.2 at 91 (7th Ed. 1993) ("It is enough that the title, right, privilege, or immunity under federal law be asserted affirmatively or defensively and that the state court's decision pass upon the federal question"); *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928) ("No particular form of words or phrases is essential," and "if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented").

Finally, it is well-settled that "Parties are not confined here to the same arguments which were advanced in the courts below upon a federal question there discussed." *Dewey v. Des Moines*, 173 U.S. 193, 198 (1899). Indeed, this Court has "never suggested that the jurisdictional stipulations of §1257 require that all arguments on behalf of, let alone in opposition to, a federal claim be raised and decided below." *Illinois v. Gates*, 462 U.S. 213, 248 (1983) (White, J., concurring). Rather, the

"parties may enlarge upon the questions they do present so long as the enlargement may be deemed fairly included or comprised within the stated questions." *Supreme Court Practice* §3.20 at 137 (citing *Gates*, 462 U.S. at 219-20).

To the extent the questions presented here are viewed as an "enlargement" of the Due Process Clause questions addressed below, this Court "should have no hesitation in holding the assignment sufficient to permit the question to now be raised and argued." *Dewey*, 173 U.S. at 198. Bawazir's Petition, Appendix to the Petition, this Reply and Appendix all demonstrate that substantial federal questions under the Due Process Clause were raised below. Jurisdiction clearly exists. *See Supreme Court Practice* §3.20 at 137 (this "Court's jurisdiction over a state court case thus effectively attaches once the Court is satisfied that a petition presents substantial federal questions raised or decided below").

B. Petitioner Complied with Supreme Court Rule 14, and Respondent's Highly Strained Reading of that Rule Is not a Basis to Deny Jurisdiction.

Sheikh Mahfouz claims that the Court lacks jurisdiction under 28 U.S.C. §1257 because "Petitioner failed to fulfill the requirements of Supreme Court Rule 14(b)(iii)-(g)(i) [sic]." Opp. at 6, 10. Presumably, Sheikh Mahfouz means Rule 14.1(g)(i), which does not invoke the Court's jurisdiction under §1257 but merely describes what a petition for a writ of certiorari must contain. Sheikh Mahfouz's highly strained interpretation of Rule 14 is flawed, and does not serve as a proper basis to deny jurisdiction under §1257.

First, Bawazir complied with *all* aspects of Rule 14. A "petition for a writ of certiorari should be stated briefly and in plain terms." Rule 14.3. It "need not contain *'all'* that is material and need not contain references to an appendix or the record." *Supreme Court Practice* §6.30 at 352. Indeed, Rule 14.1(g) requires a "*concise* statement of the case." (Emphasis added). Further, the material required under 14.1(g)(i) must only contain information "to show that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment on a writ of certiorari." In addition, Rule 14.1(g)(i) permits portions of the record relied upon to be "included in the appendix." Bawazir's Petition and Appendix clearly set forth in "concise" and "plain" terms that a "federal question was timely and properly raised" below.

Second, even if, for purposes of argument, Bawazir did not comply in a hyper-technical sense with Rule 14 as Sheikh Mahfouz claims, the remedy is not to deprive Bawazir of redress with this Court. Instead, "[i]f the Clerk determines that a petition submitted timely and in good faith is in a form that does not comply with this Rule, . . . the Clerk will return it with a letter indicating the deficiency. A corrected petition received no more than 60 days after the date of the Clerk's letter will be deemed timely." Rule 14.5.

Sheikh Mahfouz does not cite one single reported decision of this Court supporting the harsh result he seeks. As this Court admonished, "[o]ur jurisdiction does not depend on citation to book and verse." *Eddings v. Oklahoma*, 455 U.S. 104, 113 n.9 (1982). This Court "will not strain the record in an effort to divest petitioner of his federal forum." *Taylor v. Kentucky*, 436 U.S. 478, 482 n.10 (1978).

C. Respondent's Reliance on Supreme Court Rule 10(b) as a Basis to Deny Jurisdiction Is Misplaced.

Finally, Sheikh Mahfouz claims no jurisdiction exists because Bawazir purportedly did not show under Rule 10(b) that a "conflict exists among the lower courts with regard to the issues presented herein." Opp. at 6, 10-11. However, Rule 10(b) only applies to appeals from a "state court of last resort." In contrast, Rule 10(c) applies when "a state court . . . has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court."

Sheikh Mahfouz's reliance on Rule 10(b) is without foundation. Because the Washington State Supreme Court denied discretionary review of Bawazir's appeal, the judgment of the Washington State Court of Appeals "rather than the order of refusal by the higher court is the judgment reviewable under §1257." *Supreme Court Practice* §3.12 at 115. *See also Interstate Circuit, Inc. v. Dallas,* 390 U.S. 676, 678 n.1 (1968) ("The Texas Supreme Court denied discretionary review and therefore the appeal is from the judgment of the Court of Civil Appeals"). Consequently, Rule 10(c), *not* 10(b), applies to this Petition.

Bawazir's Petition properly frames the issues as required under Rule 10(c). Sheikh Mahfouz's jurisdictional argument under Rule 10(b) is without merit.

CONCLUSION

Bawazir's Petition sets forth many compelling reasons why this Court should grant review of the writ. Not only will Bawazir be deprived of legal redress should the writ be denied, but the narrow rules adopted by the Washington State courts threaten to erode this Court's fundamental principles of when states may assert personal jurisdiction over nonresidents consistent with the Due Process Clause. The writ should be granted.

Respectfully submitted,

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APPENDIX G

[EXCERPTS FROM PLAINTIFF TAHIR M. BAWAZIR'S MEMORANDUM IN OPPOSITION TO DEFENDANT KHALID BIN MAHFOUZ'S MOTION TO DISMISS]

[Filed AUG 14 1998]

The Honorable Jim Bates

SUPERIOR COURT OF WASHINGTON
IN AND FOR KING COUNTY

No. 98-2-14646-0SEA

TAHIR M. BAWAZIR,

Plaintiff,

v.

THE BOEING COMPANY, a Delaware corporation; and SHEIKH KHALID BIN MAHFOUZ,

Defendants.

PLAINTIFF TAHIR M. BAWAZIR'S MEMORANDUM IN OPPOSITION TO DEFENDANT KHALID BIN MAHFOUZ'S MOTION TO DISMISS

* * *

[5]

V. LEGAL ARGUMENT

A. The Court May Assert Jurisdiction To The Full Extent Permitted Under the Due Process Clause.

Washington courts may exert jurisdiction over nonresident defendants to the full extent permitted by the Due Process Clause of the United States Constitution. *See Shute v. Carnival Cruise Lines*, 113 Wn.2d 763, 771 (1989) ("Washington's long-arm statute extends jurisdiction to the limit of federal due process"); *Hartley v. Am. Contract Bridge League*, 61 Wn. App. 600, 605 (1991) ("The 'doing business' requirement . . . subsumes the due process requirement"). Bawazir has the burden to establish "only a prima facie showing of jurisdiction." *MBM Fisheries v. Bollinger Mach. Shop*, 60 Wn. App. 414, 418 (1991). On a motion to dismiss the allegations of the Complaint are deemed to be true. *Id.*

* * *

[8]

2. The Activities of Mahfouz's Agents, Including NCB, May Be Imputed To Him To Confer Jurisdiction.

Mahfouz claims that "NCB's contacts with Washington, if any, cannot be used to justify suit against Mahfouz." Mahfouz Motion at 12. Mahfouz is widely referred to as "Mr. NCB" and it is reported that "NCB is Khalid and Khalid is NCB." Dadoun Dec., Ex. 3 (*Moneyclips*, July 8, 1992). Mahfouz ignores his unique relationship with NCB, and that as a partner of NCB its activities – and the activities of any of his agents, including Bawazir – may be imputed to him for purposes of asserting jurisdiction. *See Crose v. Volkswagenwerk*

Aktiengesellschaft, 88 Wn.2d 50, 55 (1977) (general jurisdiction may be asserted over foreign corporation based on activities of its agent in Washington); *Trump v. Nevada & GNLV*, 109 Nev. 687, 694, 857 P.2d 740, 745 (1993) (contacts of agent with particular forum are attributable to principal in determining whether personal jurisdiction over principal is appropriate); *Chan v. Soc'y Expeditions, Inc.*, 39 F.3d 1398, 1405-06 (9th Cir. 1994) (activities of general agent attributable to principal in asserting jurisdiction).

* * *

[10]

C. The Court May Assert Specific Jurisdiction Over Mahfouz.

While the long-arm statute outlines specific requirements for establishing specific jurisdiction for the transaction of business, courts have often recognized that its limits extend as broadly as permitted by federal due process. *Shute*, 113 Wn.2d at 767. Federal due process permits the exercise of in personam jurisdiction when: 1) there have been purposeful contacts between the defendant in the forum state; 2) plaintiff's cause of action arises out of or relates to those contacts; and 3) the exercise of jurisdiction is reasonable. *Kysar v. Lambert*, 76 Wn. App. 470, 487-88 (1995). Once purposeful availment has been established, the forum's exercise of jurisdiction is presumptively reasonable. To rebut the presumption, the defendant " 'must present a compelling case' that the exercise of jurisdiction would, in fact, be unreasonable." *Roth v. Marquez*, 942 F.2d 617, 621 (9th Cir. 1991) (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477 (1985)).

1. **Mahfouz Purposefully Availed Himself of this Forum.**

   a. **The Boeing Agreement Has A Substantial Connection to Washington.**

This dispute directly arises from commission payments owed under the Agreement. In *Burger King*, the Supreme Court recognized that where individuals " 'purposefully derive benefit' from their interstate activities, it may well be unfair to allow them to escape having to account in other States for consequences that arise proximately from such activities." 471 U.S. at 473-74. The standard of purposeful availment is not rigorous, and "casts a wide net." *Pritzker v. Yari*, 42 F.3d [11] 53, 62 (1st Cir. 1994), *cert. denied*, 115 S.Ct. 1959 (1995). Where, as here, Mahfouz deliberately created "continuing obligations between himself and residents of the forum, . . . the Due Process Clause may not be readily wielded as a territorial shield to avoid interstate obligations that have been voluntarily assumed." *Burger King*, 471 U.S. at 474-76. *See also McGee v. Int'l Live Ins. Co.*, 355 U.S. 220, 223 (1957) ("it is sufficient for purposes of due process that the suit was based on a contract which had a substantial connection with that State").

Burger King is dispositive here. In *Burger King*, defendant entered into a franchise relationship with Burger King Corp., a Florida corporation. 471 U.S. at 464. Defendant resided in Michigan. *Id.* at 466. Defendant forwarded an application and final contract to Burger King at its headquarters in Miami. Defendant's sole contact with Florida was through his business partner, who attended a management training course at Burger King's Miami headquarters. *Id.* The contract was governed by Florida law. *Id.* Burger King sued defendant in Miami for breach of the contract. The Supreme Court found

that asserting jurisdiction over the defendant was proper because he had purposefully availed himself to Florida's jurisdiction by entering into a contract with Burger King. The " 'purposeful availment' requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of 'random,' 'fortuitous,' or 'attenuated' contacts." *Id.* at 475.

Mahfouz claims, however, he is immune from jurisdiction because the "mere execution of a contract" is insufficient to establish jurisdiction. Mahfouz Motion at 7. The cases relied upon by Mahfouz are unavailing. *See CTVC of Hawaii Co., Ltd. v. Shinawatra,* 82 Wn. App. 699, 714 (1996) (contacts by a Thai national involving a Thai joint venture governed by Thai law insufficient to confer jurisdiction where none of the defendant's duties or responsibilities under the parties' agreement were carried out in Washington, and plaintiffs failed to show that the defendant "derived [12] any legal protection or benefit in Washington"); *MBM Fisheries,* 60 Wn. App. at 424 (court declined to assert jurisdiction over a Louisiana defendant when the sole contact with Washington involved the *single transmission* of a contract from Seattle via a telecopier machine, involving a *single contract,* with all work relating to the contract being performed in Louisiana and defendant never setting foot in Washington to consummate or negotiate the transaction.)

As in *Burger King,* Mahfouz's contacts with Washington are neither random, fortuitous nor attenuated. Mahfouz had an ongoing relationship with Boeing for six years. He entered into five separate contracts with Boeing annually, from 1992-1996. Bawazir Dec. ¶ 23. Boeing exercised substantial control over Mahfouz, and his principal, Bawazir. Among other things, the Agreement requires Mahfouz to do the following:

- Promptly inform Boeing whenever a Customer is interested in discussing the purchase of Aircraft and at Boeing's request, arrange to bring Boeing and the Customer together for negotiations;
- Consultant shall not engage in activities in conflict with Boeing's interests; and
- Consultant shall use promotional literature, data and information furnished by Boeing only in furtherance of the objectives of this Agreement.

Further, the Agreement gave either party the option to terminate or renew the Agreement at the end of its term. Agreement ¶¶6-7. Mahfouz *chose* to renew the Agreements annually.

In addition, Bawazir, as Mahfouz's representative, had substantial and continuous contacts with Boeing, including numerous meetings in Seattle.[7] These contacts are, at a minimum, as follows:

[13]

- Under Mahfouz's express instructions to Boeing, Bawazir served as the primary contact with Boeing officials and representatives under the terms of the Consulting Agreement, correspondence from Boeing was directed to Bawazir, and Mahfouz requested that Boeing coordinate its activities through Mahfouz [sic] [Bawazir];

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[7] Washington's long-arm statute explicitly subjects any person "who in person or *through an agent*" transacts business in Washington. RCW 4.28.185 (emphasis added). The activities of agents have uniformly been held sufficient to confer personal jurisdiction over the principal. *See Chan.*, 39 F.3d at 1405-06; *Trump*, 109 Nev. at 694 (agent's contacts with forum attributable to principal); *Grove Press, Inc. v. Angleton*, 649 F.2d 121, 122 (2nd Cir. 1981) (agency established for jurisdictional purposes by showing that agent acted in forum with knowledge and consent of the nonresident principal).

- Bawazir made many visits to Seattle as part of his activities on behalf of Mahfouz and Boeing;
- Bawazir met and coordinated with senior Boeing management in Seattle by telephone for several hours each week during the six year duration of the Agreement; and
- Bawazir assisted Boeing in the preparation of correspondence and communication to Saudi royal officials and Saudi management as part of his responsibilities under the Agreement.

Bawazir Dec. ¶¶ 11-16.

Cumulatively, these contacts are substantial, and not "fortuitous" or "incidental" as Mahfouz claims.[8] Washington and federal courts have not hesitated to confer personal jurisdiction over nonresident defendants on facts far less compelling than here. *See Kysar v. Lambert*, 76 Wn. App. 470, 489-90 (1995) (court exercised jurisdiction over Massachusetts resident who ordered Christmas trees from Washington though contacts were limited to "an exchange of forms, letters and phone calls between Washington and Massachusetts," and the contract contained a choice-of-law clause that Washington law would govern any disputes).[9]

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[8] *See Burger King*, 471 U.S. at 478-79 (the entire business transaction, including "prior negotiations and contemplated future consequences, along with the terms of the contract and the parties' actual course of dealing . . . must be evaluated in determining whether the defendant purposefully established minimal contacts within the forum"); *Pepsi-Cola Bottling Co., Inc. v. Buffalo Rock Co., Inc.*, 593 F. Supp. 1559, 1565 (N.D. Al. 1984) ("resulting contacts can hardly be called fortuitous or unintended" where defendant was fully aware from outset that transaction would be intimately connected with Alabama, and that interests in transaction required substantial number of activities there).

[9] *See also Sorb Oil Corp. v. Batalla Corp.*, 32 Wn. App. 296, 299 (1982) (nonresident defendant engaged in purposeful con-

[footnote continued]

[14] **b. Solicitation Is Not A Prerequisite To Jurisdiction.**

Mahfouz suggests he should be immune from jurisdiction because "Boeing, not Mahfouz" solicited the Agreement which was renewed by the parties on an annual basis for five years. Mahfouz Motion at 7. This assertion neither comports with the facts or the law.

First, the Complaint makes clear that Mahfouz and Bawazir "were one of several teams vying to act as Boeing's consultant in the competition for the Saudia commercial airplane order." Complaint ¶15. The Agreement was automatically terminable without notice at the end of its one-year term. Agreement ¶6. Of his own volition, Mahfouz sent to Boeing renewals each year, from 1993-1996, thus explicitly soliciting Boeing with a request for renewal of his services. Bawazir Dec. ¶23. Boeing was not obligated to renew the Agreement. Agreement ¶¶6-7. In addition, Mahfouz solicited The Frank Russell Company with a request that it act as a referral in connection with the Agreement. Mahfouz needed the referral in order to be approved as Boeing's consultant with his partner, Bawazir. Bawazir Dec. ¶10.

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duct by ordering by telephone oil products from Washington corporation that were shipped from Indiana, not Washington, to defendant); *Crown Controls, Inc. v. Smiley*, 47 Wn. App. 832, 836-839 (1987) (nonresident defendant's telephone orders sufficient to confer jurisdiction); *Cofinco of Seattle v. Wiess*, 25 Wn. App. 195, 196-97 (1980) (nonresident defendant purposefully availed himself of the privilege of conducting activities within Washington state by entering into an oral telephone contract from New York with Washington employer); *Roth v. Marquez*, 942 F.2d 617, 622 (9th Cir. 1991) (nonresident defendant purposefully availed himself in California where checks owed under the agreement would have originated from the forum state and depended upon activities in the forum).

Second, even if Mahfouz purportedly did not solicit Boeing to become its consultant – a fact the parties dispute – the absence of solicitation is not fatal to asserting jurisdiction over Mahfouz. It is well-settled that "a party who does not initiate the business contact is not thereby immune from personal jurisdiction of Washington courts if a business relationship subsequently arises." *Sorb Oil*, 32 Wn. App. 296, 299.[10]

* * *

[17]

2. This Cause of Action Arises From The Consultant Services Agreement.

Washington may assert jurisdiction over Mahfouz so long as Bawazir's cause of action would not have arisen "but for" Mahfouz's contacts with Washington. *See Shute v. Carnival Cruise Lines*, 113 Wash.2d 763, 772 (1989) (plaintiff's injury on cruise ship in Mexico would not have arisen but for nonresident defendant's advertising its travel tours in Washington).

Mahfouz contends, without any supporting evidence, the "but for" test is unsatisfied because he visited Washington only once, and his visit was "incidental" to the Saudia sale. Mahfouz Motion at 7-8. In reality, Bawazir's claims arise from the Agreement between Boeing and

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[10] *See also Cofinco*, 25 Wn. App. at 196-97 (jurisdiction over nonresident defendant initially contacted by Washington employer to perform services in New York sufficient to confer jurisdiction in Washington); *Kysar*, 76 Wn. App. at 489-90 ("exchange of forms, letters and phone calls" coupled with Washington choice-of-law clause supported finding of jurisdiction even if plaintiff initiated transaction).

Mahfouz. Bawazir seeks commission payments owed to him under the Agreement. The commission payments were to be paid only if as a result of the services performed under the Agreement, Boeing obtained a contract with Saudia. In other words, this dispute would not arise "but for" the $5.2 billion contract Boeing won with Saudia, and under which commission payments are owed. This second prong of the due process test is easily satisfied.

* * *

APPENDIX H

[EXCERPTS FROM APPELLANT'S BRIEF]

No. 43375-0-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

TAHIR M. BAWAZIR,
Appellant,

v.

THE BOEING COMPANY, AND
SHEIKH KHALID BIN MAHFOUZ
Respondents.

APPELLANT'S BRIEF

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* * *

[4] II. ASSIGNMENTS OF ERROR

A. Assignments of Error

1. The Trial Court erred in granting Boeing's 12(b)-(6) motion to dismiss.

2. The Trial Court erred in granting Sheikh Mahfouz's motion to dismiss the lawsuit for lack of personal jurisdiction.

3. The Trial Court erred in granting Sheikh Mahfouz's motion to dismiss the lawsuit on forum non conveniens grounds.

4. The Trial Court erred in summarily dismissing the Complaint against Sheikh Mahfouz without permitting Bawazir the right to conduct discovery.

B. Issues Pertaining to Assignments of Error

1. Do numerous factual disputes relating to Bawazir's claims against a Washington State resident corporation, Boeing – including Boeing's assertion that it made a "mistake" when it paid Bawazir a [5] commission installment of $6.8 million for the sale of airplanes manufactured in Washington State – preclude dismissal under CR 12(b)(6) of claims that Boeing had an obligation to pay Bawazir for helping Boeing win a $5.2 billion airplane order with Saudia?

2. Did Sheikh Mahfouz purposefully avail himself of this state's jurisdiction by agreeing to be employed under a six-year contractual relationship to provide consulting services on Boeing's behalf, and at its discretion, for the purchase of Washington State manufactured Boeing airplanes when this lawsuit would not have arisen but for this long-term relationship?

3. Did the Trial Court abuse its discretion in dismissing the lawsuit on forum non conveniens ground by (a) not

entering any findings of fact explaining its decision; (b) not requiring Sheikh Mahfouz to offer any evidence or otherwise meet his burden to show that Saudi Arabia is an adequate alternative forum; (c) not requiring Sheikh Mahfouz and Boeing to consent to service of process, jurisdiction or enforcement of any judgment in Saudi Arabia; and (d) not requiring Sheikh Mahfouz to provide any evidence that Saudi Arabia is a more convenient forum to hear this dispute?

4. Did the Trial Court err in denying Bawazir the right to conduct discovery on jurisdiction and forum non conveniens issues after Bawazir made a prima facie showing that jurisdiction over Sheikh Mahfouz exists and Washington State is the only forum in which Bawazir can obtain justice?

* * *

[27]

B. Sheikh Mahfouz Purposefully Availed Himself of This State's Jurisdiction Through His Six-Year Employment By Boeing.

The Trial Court's determination whether jurisdiction may be exercised is a question of law reviewable de novo when the underlying facts are undisputed. *Hartley v. Am. Contract Bridge League,* 61 Wn.2d 600, 603, 812 P.2d 109 (1991). Because Bawazir's evidence in support of his opposition to Sheikh Mahfouz's motion to dismiss is uncontroverted, no facts underlying the basis for jurisdiction are in dispute.

1. Only a Prima Facie Showing of Jurisdiction Is Required.

Washington courts may exercise jurisdiction over nonresident defendants to the full extent permitted by the Due Process Clause of the U.S. Constitution. *Shute v. Carnival Cruise Lines*, 113 Wn.2d 763, 771, 783 P.2d 78 (1989). Federal due process permits the exercise of in personam jurisdiction when: (1) there have been purposeful contacts between the defendant in the forum state; (2) plaintiff's cause of action arises out of or relates to those contacts; and (3) the exercise of jurisdiction is reasonable. *Kysar v. Lambert*, 76 Wn. App. 470, 487-88, 887 P.2d 431 (1995). Once purposeful availment has been established, the forum's exercise of jurisdiction is presumptively reasonable. To rebut the presumption, the defendant " 'must present a compelling case' that the exercise of jurisdiction would, in fact, be unreasonable." *Roth v.* [28] *Marquez*, 942 F.2d 617, 621 (9th Cir. 1991) (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985)).

> Where, as in this case, the Trial Court ruled on the issue . . . without holding an evidentiary hearing, dismissal is appropriate only if the plaintiff has not made a prima facie showing of personal jurisdiction.

Fields v. Sedgwick Assoc. Risks, Ltd., 796 F.2d 299, 301 (9th Cir. 1986). In reviewing the dismissal, the court must "review the facts in the light most favorable to the party opposing dismissal." *Access Road Builders v. Christenson Elec. Contracting Eng'g, Co.*, 19 Wn. App. 477, 481, 576 P.2d 71 (1978).

* * *

[29]

3. Sheikh Mahfouz Deliberately Availed Himself of Washington State's Jurisdiction by Maintaining His Employment – Relationship With Boeing's Seattle Headquarters.

a. Sheikh Mahfouz Subjected Himself to the Jurisdiction of Washington State Courts Because He Transacted Business in Washington.

Under RCW 4.28.185, "even a solitary business deal transacted in this state is sufficient to vest jurisdiction." *International Sales & Lease, Inc. v. Seven Bar Flying Serv., Inc.*, 12 Wn. App. 894, 898, 533 P.2d 445 [30] (1975). Sheikh Mahfouz's employment with Boeing constituted far more than a "solitary business deal" in Washington State.

From 1992 through 1997, Sheikh Mahfouz was employed by Boeing to provide services in connection with the Saudia sale. The contract of employment required Sheikh Mahfouz to visit Seattle for high-level conferences, correspond with Boeing officials in Seattle, provide representations and warranties to Boeing, take direction and follow instructions from Boeing, be subject to legal restrictions imposed by the U.S. government on Boeing, send agents to Washington State to assist Boeing, and execute on an annual basis a new written contract and in so doing agree to be bound by Washington law. Sheikh Mahfouz has benefited greatly from these Washington contacts. He will receive several hundred million dollars in commissions under the Agreements. The claims in this lawsuit arise from Sheikh Mahfouz's relationship with Boeing over this six-year period.

Contracts – including employment contract – between a nonresident and a Washington State business con-

fer jurisdiction to a Washington court.[13] For example, in *Cofinco,* this Court reversed a Trial [31] Court's dismissal for lack of jurisdiction. This Court held that by "entering the employment contract," the defendant submitted to Washington's jurisdiction, even though he had "never been in the state . . . never owned property [here] and has never engaged in activities, business or otherwise, in this state." 25 Wn.App. at 197.

In *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985) the Supreme Court

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[13] *See Kysar,* 76 Wn. App. at 489-90 (court exercised jurisdiction over Massachusetts resident who ordered Christmas trees from Washington, though contacts were limited to "an exchange of forms, letters and phone calls between Washington and Massachusetts," and the contract contained a choice-of-law clause that Washington law would govern any disputes); *Sorb Oil Corp. v. Batalla Corp.,* 32 Wn. App. 296, 299, 647 P.2d 514 (1982) (nonresident defendant engaged in purposeful conduct by ordering by telephone products from Washington corporation that were shipped from Indiana, not Washington, to defendant); *Crown Controls, Inc. v. Smiley,* 47 Wn. App. 832, 836-39, 737 P.2d 709 (1987) (nonresident defendant's telephone orders sufficient to confer jurisdiction); *see also Roth,* 942 F.2d at 622 (nonresident defendant purposefully availed himself in California where checks owed under the agreement would have originated from the forum state and depended upon activities in the forum); *CompuServe Inc. v. Patterson,* 89 F.3d 1257, 1264 (6th Cir. 1996) (jurisdiction established solely on contacts through the Internet); *Pepsi-Cola Bottling Co. Inc. v. Buffalo Rock Co.,* 593 F. Supp. 1559, 1565 (N.D. Ala. 1984) ("[N]onresident's purposeful affiliation with a state for purposes of pecuniary gain has long been deemed a sufficient contact to render the nonresident subject to suit in the courts of that state . . . *even if the nonresident has no physical presence in the state whatsoever.*" (emphasis added)); *Burger King,* 471 U.S. at 478-79 (the entire business transaction, including "prior negotiations and contemplated future consequences, along with the terms of the contract and the parties' actual course of dealing must be evaluated in determining whether the defendant purposefully established *minimal* contacts within the forum") (emphasis added).

reached the same conclusion as this Court in *Cofinco*. It held that where, as here, a defendant deliberately created "continuing obligations between himself and residents of the forum, . . . the Due Process Clause may not readily be wielded as a territorial shield to avoid interstate obligations that have been voluntarily assumed." *Burger King*, 471 U.S. at 474-76. *See also McGee v. International Life Ins. Co.*, 355 U.S. 220, 223, 78 S.Ct. 199, 2 L.Ed.2d 223 (1957) ("[I]t is sufficient for purposes of due process that the suit was based on a contract which had a substantial connection with that State.").

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b. Sheikh Mahfouz Subjected Himself to the Jurisdiction of Washington State's Courts Because He Transacted Business Through His Agent Bawazir.

Washington's long-arm statute explicitly subjects to the jurisdiction of Washington State courts any person "who in person or *through an agent*" transacts business in Washington. RCW 4.28.185 (emphasis added). *See also Chan v. Society Expeditions, Inc.*, 39 F.3d 1398, 1405-06 (9th Cir. 1994).

Sheikh Mahfouz's contacts with Boeing through his agent Bawazir were extensive and include having:

- Bawazir serve as the primary contact with Boeing officials and representatives;
- Bawazir make many visits to Seattle as part of his activities on behalf of Sheikh Mahfouz and Boeing;
- Bawazir meet and coordinate with senior Boeing management in Seattle by telephone for several hours each week; and

- Bawazir assist Boeing in the preparation of correspondence and communication to Saudi royal officials and Saudia management.

CP 677-78 ¶¶ 11-16.[17]

4. This Lawsuit Would Not Arise "But For" Sheikh Mahfouz's Agreements With Boeing.

Washington may assert jurisdiction over Sheikh Mahfouz because Bawazir's cause of action would not have arisen "but for" Sheikh [35] Mahfouz's Agreements with Boeing. *See Shute*, 113 Wn.2d at 772. The Washington Supreme Court has held that jurisdiction may be asserted, and the minimum due process requirement satisfied, if the "but for" test is met. *Id. See also Port Lynch, Inc. v. New England Int'l Surety of Am., Inc.*, No. C89-465Z, 1990 WL 167126 (W.D. Wash. May 23, 1990); *Ballard v. Savage*, 65 F.3d 1495, 1500 (9th Cir. 1995) (*Shute's* "but for" test followed in asserting jurisdiction).

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[17] *See Nakanishi v. Foster*, 64 Wn.2d 647, 659, 393 P.2d 635 (1964) (nonresident defendant who contracted with an agent "on a commission basis" to secure supplies in Washington subject to Washington's jurisdiction based on agent's activities in Washington); *Barer*, 20 Wn. App. at 481 (activities of nonresident defendant's manager in state "all that is necessary" to confer jurisdiction); *Bowen v. Bateman*, 76 Wn.2d 567, 576-77, 458 P.2d 269 (1969) (activities of nonresident defendant's partner in state sufficient to confer personal jurisdiction).

5. The Assumption of Jurisdiction Over Respondents Is Reasonable.

a. The Trial Court's Rulings Will Have a Detrimental Impact on International Trade in Washington State.

The U.S. Supreme Court recognized long ago that "modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity." *McGee*, 355 U.S. at 223.

The Washington Supreme Court likewise has held that the long-arm statute recognizes:

> [A]s an economic fact of modern life that large segments of commerce . . . inevitably seek out a connection with or link to customers, consumers . . . or subcontractors in other states who intend or contemplate that the product, process or article of commerce . . . shall be used or employed in states other than the place of origin or beginning.
>
> . . .
>
> The connecting link then may consist of affirmative acts taking place here by which the out-of-state resident overtly submits to jurisdiction; . . . or the initiation of a transaction outside the state in contemplation that some phase of it will take place in the forum state. . . . The existence of these phenomena of modern economy are ordinarily enough to bring the parties within the long-arm statute without engendering an unjust or oppressive extension of jurisdiction.

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Griffiths & Sprague Stevedoring Co. 71 Wn.2d at 684.[18]

The Trial Court's rulings are a giant step backwards from these "economic facts of modern life."

b. The Assumption of Jurisdiction Is Reasonable Because Sheikh Mahfouz Has Extensive Ongoing Activities in Washington.

Because the first two prongs under the due process test are satisfied, the burden has shifted to Sheikh Mahfouz to "present a compelling case that the presence of some other considerations would render jurisdiction unreasonable." *Burger King*, 471 U.S. at 476. But Sheikh Mahfouz provided no evidence that asserting jurisdiction over him is unreasonable.

Sheikh Mahfouz frequently travels to the United States and maintains residences here. CP 674-75 ¶¶2-3. He has substantial relationships with Boeing in Seattle and the Frank Russell Company in Tacoma. He owns several businesses in this state. CP 111 ¶¶6-8, Exs. 5-7 (CP 148, 151-55). He or his family owned a residence in the Seattle area. CP 675 ¶3. He owns at least two Boeing airplanes (a 757 and a 767), making travel convenient. CP 674 ¶2; App. A.

Defending this lawsuit in this forum will not amount to a "due process violation" or place Sheikh Mahfouz at

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[18]Nowhere should this be more apparent than our state, standing as we do at a major crossroads of international trade. "Washington is the most trade-oriented state in America, [and]... is home to the United States' largest exporter, the Boeing Company." *See Washington State Community, Trade & Economic Development* (<http://www.trade.wa.gov/whyis.htm>(Dec. 14, 1998)).

"a severe disadvantage in [37] comparison to his opponent." *See McGee*, 355 U.S. at 224. *Burger King*, 471 U.S. at 474.

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